IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 156 of 1977

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SURVIRSINGH N SURATWALA

Versus

CHANDRAVADAN C SURATWALA

Appearance:

1. Second Appeal No. 156 of 1977

MS KJ BHRAMBHATT for MS VASUBEN P SHAH for Petitioner No.1,5-6

MR DD VYAS for Petitioner No. 2-4

MS MD MEHTA for MR SN SHELAT for Respondent No. 1

MR SH SANJANWALA for Respondent No. 2-3

DELETED for Respondent No. 4,6-7

NOTICE SERVED for Respondent No. 5

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 17/07/2003

ORAL JUDGEMENT

1. This Second Appeal under Section 100 of Civil Procedure Code is directed against the Judgement, order

and decree dated 25th March, 1977 passed by the learned Extra Assistant Judge, Surat in Regular Civil Appeal No.108 of 1974 dismissing the said appeal and confirming the judgment and decree dated 26th August, 1974 passed by the learned 2nd Joint Civil Judge (Junior Division), Surat, in Civil Suit no.931 of 1956.

2. The short facts giving rise to the present litigation between the parties are as follows :-

2.1. Respondent no.1 is the original plaintiff. At the relevant time, he was a minor who had been admitted to the benefits of partnership. His mother, as his next friend and guardian-ad-litem, filed the suit on 22nd October, 1956 for severance of his interest from the partnership firm known as M/s.C.B. Suratwala and Sons and for taking accounts of the said partnership firm and payment to the plaintiff of the amount that may be found due on taking accounts. The learned Civil Judge passed the preliminary decree on 20th October, 1967. The appellants who were the original defendants preferred an appeal to the District Court, but the same was dismissed. The Second Appeal to the High Court was dismissed on 27th March, 1974. Thereafter the Court Commissioner proceeded with the work of taking accounts and for determining the amount due to the plaintiff. He submitted his report at Exh.284. The parties filed their statements against Commissioner's report. The learned Trial Judge after considering the report of the Commissioner and hearing submissions made on behalf of the parties found as follows :-

(i) Rs.27,074=00 were shown due to the plaintiff in the books of accounts of the firm and there was no dispute about the same. The plaintiff was entitled to recover the said amount with interest at the rate of 6% per annum. After deducting Rs.19,500 shown as withdrawn by the plaintiff from the Court on 30.04.1970, the learned Judge held that the plaintiff was entitled to recover Rs.37,028.30, which included Rs.7,523.55 as interest from 01.05.1970 to 31.07.1974. He also held that the defendants were not entitled to withdraw any amount towards salary and since they had withdrawn Rs.38,400=00, the plaintiff was entitled to recover Rs.10,800=00, being his share in the said amount, with simple interest at the rate of 6% per

annum from 01.11.1956. The amount of interest on Rs.10,800=00 from 01.11.1956 to 31.07.1974 came to Rs.11,502=00.

3. In view of the said finding, the learned trial Judge held that the plaintiff was entitled to recover Rs.37,028.30 plus Rs.22,302=00, in all Rs.59,330.30. He, therefore, passed the decree for the said amount, which included interest at the rate of 6% per annum upto 31.07.1974 and also granted running interest on the said amount at the same rate from 01.08.1974 till realisation.

4. The appellants preferred Regular Civil Appeal no.108 of 1974 to the District Court, but the same was dismissed by the learned Extra Assistant Judge.

5. The appellants have, therefore, filed the Second Appeal challenging the said final decree.

6. The Second Appeal was admitted on the following substantial questions of law formulated by the Court at the time of admission :-

(1) Whether in the facts and circumstances of the case, the Courts below erred in refusing to infer contract between the partners of the firm regarding the withdrawal of the amount of Rs.19,200=00 at the rate of Rs.200=00 per month as salary as remuneration for each partner.

(2) If no, whether the Courts below erred in sadding the appellants also with the liability of Rs.19,200=00 being the amount withdrawn by way of salary or remuneration by the deceased partner Harkisandas; and

(3) Whether the Courts below erred in allowing interest at 6% per annum on the amount of interest contrary to Section 34 of the Code of Civil Procedure.

7. Learned counsel for the appellants took me through the judgments of the Courts below and submitted that the Courts had erred in holding that the appellants were not entitled to withdraw any amount of salary as remuneration for each partner and that the Courts below had also erred in sadding the appellants with liability of Rs.19,200=00 being the amount withdrawn by way of salary or remuneration by the other partner, deceased

Harkisandas. She also submitted that the Courts below had erred in allowing interest at 6% per annum on the amount of interest contrary to Section 34 of Civil Procedure Code.

8. As far as the first contention is concerned the Courts below have recorded concurrent finding of fact that the appellants and the other partners were not entitled to debit Rs.200=00 per month as salary. The said finding of fact is based on appreciation of evidence and it cannot be interfered with in Second Appeal. The first question of law formulated at the time of admission is, therefore, answered in the negative.

8.1. As far as the second question is concerned, the learned appellate Judge has rightly observed that there is no direction in the preliminary decree to apportion the liability between the original defendants nos.1 and 2 and no objection was raised by the appellants before the Court Commissioner regarding apportionment of the liability and the preliminary decree was confirmed by this Court in the previous round of appeals. The Courts below have rightly refused to reopen the preliminary decree. The second question also is, therefore, answered in the negative.

8.2. However, the contention that interest on the amount of interest should not have been allowed is well founded. As stated earlier, the decree for Rs.59,330.30 includes Rs.19,025.55 as interest upto Rs.31.07.1974. This was not the case where capitalization of interest was justified. The Courts below have erred in awarding interest at 6% from 01.08.1974 on the amount of interest which was calculated till 31.07.1974.

9. In the circumstances, the decree passed by the Courts below will have to be modified after deducting the amount of interest which is calculated till 31.07.1974. The principal amount will be Rs.40,000=00 after rounding down the figure. The plaintiff is, therefore, entitled to recover running interest at 6% from 01.08.1974 till realization on the said amount.

10. The result is that Second Appeal is partly allowed. The decree for Rs.59,330.30, which includes interest at 6% per annum upto 31.07.1974, is confirmed. However, the plaintiffs shall be entitled to recover running interest at the same rate from 01.08.1974 till realization on Rs.40,000=00 and not Rs.59,330.30 as directed by the Trial Court. The decree passed by the Trial Court and confirmed by the appellate Court shall

stand modified to the aforesaid extent. No order as to costs.

[M.C. PATEL, J.]

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